**MUNIANDY & ANOR.**

**v.**

**MUHD. ABDUL KADER MUHD. SAHEED & ORS.**

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. AZMI SCJ
HARUN HASHIM SCJ
[CIVIL APPEAL NO. 226 OF 1987]
26 MAY 1989

***LANDLORD AND TENANT:*** *Rent Control Act 1966 - Applicability - Trespassers or tenants - Onus of proof of payment - New point raised at appeal stage - Tenancy coupled with equity - Rent Control Act 1966.*

The appellants occupied an unnumbered plank house in the portion of Holding known as No. 18 Town Subdivision 9W, North East District, Penang. The respondents obtained an order for vacant possession against the appellants.

In the Magistrate's Court, the learned Magistrate found that the house was subject to the Rent Control Act but no relationship of landlord and tenant, as there was no evidence of payment of ground rent. On appeal to the High Court, the learned Judge upheld the findings of fact of the learned Magistrate that no rent had ever been paid to the respondent and that the appellants were trespassers.

In the Supreme Court, appellant's Counsel attempted to argue a fresh point not pleaded or argued in the Courts below that as owners of the plank house, the appellants have an equitable interest in the land.

**Held:**

**[1]** Based on the pleadings, the onus was on the appellants to prove the payment of ground rents, as these were within their particular knowledge. It was not for the plaintiff to prove a negative.

**[2]** As a general rule, a new point cannot be raised in an appeal, which was not pleaded or argued in the Courts below. This rule is subject to certain exceptions and the present case does not come under any of these established exceptions.

*[Appeal dismissed with costs.]*

**Cases referred to:**

*Mok Deng Chee v. Yap See Hoi & Ors. [1981] CLJ (Rep) 69*
*Antonio Dias Caldeira v. Frederick Gray [1936] MLJ 137*
*Khew Ah Bah v. Hong Ah Mye [1971] 2 MLJ 86*
*Inward v. Baker [1965] 1 All ER 446*
*Ramsden v. Dyson [1866] LR 1 HL 129*
*Yong Mok Hin v. United Malay States Sugar Industries Ltd. [1967] 2 MLJ 9*
*Attorney-General v. Pang Ah Yew [1934] MLJ 184*
*Banbury v. Bank of Montreal [1918] AC 626*
*Letchumi & Anor. v. Asia Insurance Co. Ltd. [1972] 2 MLJ 105*
*See Hua Daily News Bhd. v. Tan Thien Chin & Ors. [1986] 2 MLJ 107*
*Mariappan v. Government of Malaysia [1983] 2 MLJ 340*
*Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1989] 1 CLJ (Rep) 1*
*Edler v. Everbach [1950] 1 KB 359*

*Hardmore Productions v. Hamilton [1983] 1 AC 191*
*Burns v. Devon's Iron Works Ltd. [1961] SC 102*

*For the appellants - G. Sri Ram; M/s. Sri Ram, Zulkifly & Kumar*
*For the respondents - Abu Haniffa Md. Abdullah; Syarikat Abu Haniffa*

**JUDGMENT**

**Mohd. Azmi SCJ:**

This is an appeal against the decision of Edgar Joseph Jr. J who upheld an order of vacant possession dated 4 November 1981 granted to the respondents by Puan No Mooi Ching, the Magistrate of George Town, Penang. The order relates to vacant possession of that portion of Holding No. 18 Town Subdivision 9W, North East District, Penang, on which stood an unnumbered plank house erected by the 2nd appellant's late husband by the name of Koniah, and now owned and occupied by her together with her son, the 1st appellant. The respondent's claim is based on a notice to quit issued on the 1st appellant requiring him to vacate the respondents's land within one month from 2 August 1974, and on another notice to quit issued on 3 April 1980 requiring the 2nd appellant to quit the land forthwith for trespassing. Both the appellants refused to comply with the said notices. Hence the suit taken against them.

Before the learned Magistrate, two main issues were canvassed by the appellants for the purpose of establishing that they were protected by the Rent Control Act 1966. The first issue was whether the house was built before or after 31 January 1948, and the second issue was whether the 1st appellant and his mother, the 2nd appellant were paying grounds rents to the respondents or to any of their predecessors in title. On the evidence before her, the learned Magistrate concluded that the house was subject to rent control legislation as it was built before 31 January 1948 by the deceased Koniah who was the father of the 1st appellant and the husband of the 2nd appellant. But on the second issue, she came to the conclusion that both the appellants were trespassers, there being no relationship of landlord and tenant. She found no evidence that any ground rent had been paid either to the respondents or to any of their predecessors in title. Hence she entered judgment for the respondents.

On appeal to the High Court, the discussion on the first issue would appear to be an exercise in futility. The protection claimed by the appellants under the Rent Control Act by reason of the fact that they were ground tenants is clearly untenable in law. As there was no dispute on the ownership of the house, the issue was not at all relevant and ought to have been immediately rejected both by the learned Magistrate and the learned Judge. As stated by Salleh Abbas FJ (as he then was) in *Mok Deng Chee v. Yap See Hoi & Ors.* [1981] CLJ (Rep) 69 at 73 on the application of Rent Control Act 1966:

> The Act *inter alia* protects a tenant who rents a house from his landlord, where the house was built before 31 January 1948. It has nothing to do with the case of a tenant who rents only the land but owns the house, i.e., the Act does not apply where the landlord does not own the house.

Regarding the other issue, the appellants continued with their same argument as in the Magistrate's Court that the appellants did pay ground rents at one time or another to the predecessors in title, in particular to N.T.S. Arumugam Pillai, to whom according to para. 5 of the amended statement of defence, the 2nd appellant had been paying monthly rent since 1963.

It is obvious on the pleadings and the evidence adduced at the trial that the main and only thrust of the appellants defence was that they paid ground rents to Arumugam Pillai since 1963 until the respondents purchased the property in 1974. It was on this payment of land rents that consent of Arumugam Pillai must be assumed over appellant's occupation of the property since 1963.

In dismissing the appeal the learned Judge had no choice but to treat the appeal as based solely on the question of whether the appellants occupied the land as trespassers or as tenants paying ground rent to the respondent's predecessors in title or any of them. After examining the evidence relevant to this question, the learned Judge upheld the findings of fact of the learned Magistrate that no rent had ever been paid either to the respondents or to any of their predecessors in title, and that the appellants were trespassers. Sitting as an appellate Court, the learned Judge applied the test laid down by the Privy Council in *Antonio Dias Caldeira v. Frederick Gray* [1936] MLJ 137, and consequently saw no reason to dissent from the conclusion arrived at by the learned Magistrate.

Having regard to the state of the pleadings we entirely agree with the ruling of both the Courts below that the onus was on the appellants to prove the averment in their amended defence that since 1963 they had paid ground rents to Arumugam Pillai, one of the predecessors in title. These payments were within their particular knowledge, and as stated by the learned Judge, "It was not for the plaintiffs to prove a negative." The 1st appellant had admitted in cross-examination that he had never paid any rent for the land although he tried to resile from his admission in re-examination. Neither did the appellants produce any rent receipts and nor did they produce an alleged letter from Arumugam Pillai giving them permission to occupy the land. Arumugam Pillai was not even called to testify although he was available as a witness.

It is therefore not surprising that before us, Counsel for the appellants has straight-away conceded that the Courts below must be accepted. But he intends to introduce and argue a fresh point not pleaded or argued in the Courts below that as owners of the plank house, the appellants have an equitable interest in the land, and as such they are not trespassers, but have a tenancy coupled with equity in accordance with the principles laid down in *Khew Ah Bah v. Hong Ah Mye*, [1971] 2 MLJ 86 and *Mok Deng Chee v. Yap See Hoi & Ors.* [1981] 2 MLJ 32 FC;[1981] CLJ (Rep) 69.

Both these authorities were based on the equitable principle laid down in *Inward v. Baker* [1965] 1 All ER 446, which refined the concept of equitable estoppel in tenancy law. The principle is also known as tenancy coupled with equity and referred to in *Ramsden v. Dyson* [1866] LR 1 HL 129 by Lord Kingsdown as the principle of irrevocable licence. In our opinion, it is pertinent to observe that where the defence of equitable estoppel succeeds it does not necessarily follow that a claim for vacant possession must fail. The principle merely says that where a defendant acquires a tenancy coupled with equity, the landlord cannot recover vacant possession of his land by merely terminating the tenancy with notice to quit, but he must also satisfy the equity. In what way the equity would be satisfied must depend on the facts and circumstances of each case. In *Khew Ah Bah's* case, the equity was held to be satisfied by the landlord paying a reasonable compensation to the defendant who was the owner of the house.

The learned Counsel for the appellants has referred to us two authorities which would persuade us to allow a new point to be raised and argued in this appeal although the matter was not pleaded or raised in arguments in the Courts below. We would deal first with the

case of *Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1967] 2 MLJ 9 where MacIntyre J in delivering the judgment of the Federal Court quoted the observation of Reay J in *Attorney-General v. Pang Ah Yew* [1934] MLJ 184 at 187 and that of Finlay LC in *Banbury v. Bank of Montreal* [1918] AC 626, 654, 705 and 714, as based on the general principle that "where a decision on a question of law is dependent upon a finding of fact which was not made by the Judge or Jury because the question was not raised or put at the trial or where the question of law cannot be resolved without further evidence not available on the record, a Court of Appeal would not interfere with the judgment or verdict of the lower Court." This principle is subject to certain exceptions as expounded by Lord Parker and Lord Wrenbury in *Banbury* Case. According to the Federal Court:

> Two points emerge from observations of Lord Parker and Lord Wrenbury. They are, first, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction; and, secondly, the Court of Appeal would entertain a point of law not raised in the Court below if it would result in the rectification of an erroneous order.

The other case cited is *Letchumi & Anor. v. Asia Insurance Co. Ltd.* [1972] 2 MLJ 105 where the Federal Court had allowed a new point to be raised in the interest of justice which was an omission at the trial. Ong CJ said:

> An omission, at the trial by inadvertence or otherwise, to canvass an arguable point is not the same thing as abandoning it altogether - which would have precluded us from re-opening and reconsidering the matter.

We would also refer to a decision of this Court in *See Hua Daily News Bhd. v. Tan Thien Chin & Ors.* [1986] 2 MLJ 107 @ 108 where following *S. Mariappan v. Government of Malaysia* [1983] 2 MLJ 340 it was held that, "This Court has a discretion in the interest of justice to allow the objection on jurisdiction although it was never raised in the Courts below".

This exception to the principle was fully discussed by Abdul Hamid FJ (as he then was) in *Mariappan's* case. More recently the Privy Council in *Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1989] 1 CLJ (Rep) 1 has stated as an exception to the rule that parties must be bound by their pleadings:

> It is well established as a general principle that the illegality of an agreement sued upon is a matter of which the Court is obliged, once it is apprised of facts tending to support the suggestion, to take notice *ex proprio motu* and even though not pleaded (see eg., *Edler v. Everbach* [1905] 1 KB 359) for clearly no Court could knowingly be party to the enforcement of an unlawful agreement.

Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hardmore Productions v. Hamilton* [1983] 1 AC 191:

> Under our adversary system of procedure, for a Judge to disregard the rule by which Counsels are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any peril adverse to him that is going to be relied upon by the Judge, and to be given in the opportunity of stating what his answer to it is ...

As to what is technical ground, in an objection to defective pleading can be illustrated from the judgment of Clerk Thomson LJ in *Burns v. Devon's Iron Works Ltd.* [1961] SC 102:

> The Court is often charitable to records, and is slow to overturn verdicts on technical grounds. But when a purser fails completely to substantiate the only grounds of faults averred and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred (i.e., pleaded), but is something which is new, separate and distinct, we are not in a realm of technicality.

In our view these authorities do not appear to support the appellants' application. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorised as falling within the realm of technicality. The so called "omission" is in fact a new line of defence altogether. The new defence based on equitable estoppel was never pleaded or argued in the Courts below. The stand taken by the appellant throughout was that they were not trespassers because they were paying ground rents to Arumugam Pillai since 1963, and due to the said ground tenancy, they claimed albeit mistakenly protection against eviction under the Rent Control legislation.

For reasons stated we do not think this is an appropriate case where we should allow the appellants to argue a new line of defence without hearing fresh evidence. To establish a defence of tenancy coupled with equity it may be necessary to enquire further whether the 2nd appellant had acquired the equity from her late husband Koniah through transmission or whether she had acquired it herself from Arumugam Pillai. Without adducing fresh evidence, it is not possible for instance to conclude under what circumstances Koniah or the 2nd appellant was required or allowed by the then predecessor in title to build the plank house, and how much money he had expended in the construction of the plank house and whether any improvements had been made to the house, either by Koniah or the appellants over the years, for the purpose of determining whether the payment of reasonable compensation would be sufficient to satisfy the equity. On the other hand, the period of overstaying from the expiry date of notices to quit, might be long enough to satisfy it. In other words, if the appellants' application were allowed, not only a whole range of entirely new issues would have to be determined but it would also be inconsistent with the appellant's defence under the Rent Control Legislation. The application to argue the new defence of equitable estoppel is therefore refused.

For reasons already stated the appeal is dismissed with costs both here and in the Courts below. The deposit is to be paid to the respondents to account of taxed costs.

Also found at [1989] 2 CLJ 577